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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 28

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO, Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO, Charging Party.	No. 28-CA-060841 **BRIEF OF CHARGING PARTY TO NOTICE AND REQUEST TO FILE BRIEFS**

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I. INTRODUCTION

There is no issue under *Purple Communications, Inc*., 361 NLRB 1050 (2014) ("*Purple*") that needs to be decided. Under the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), *motion for reconsideration denied*, 366 NLRB No. 128 (2018) ("*Boeing*"), the employer's rule prohibiting the use of email to "[s]end chain letters or other forms of non-business information" *allows* the unrestricted right to send "business information" for those who are granted access to email. The employer and employees are both permitted to send "business information" about working conditions. This allows employees to engage in protected concerted communications over email about working conditions during work and non-work time. The allegation in the Complaint that this is unlawful should be dismissed because the employer gives broader rights of the use of email to those employees who have access to email than *Purple* requires.

This record demonstrates why *Purple* was too narrowly decided. The case focused on permitting employees to use email only on non-work time. Because employees who have access to such email use it for communications about "wages, hours, and other terms and conditions of employment" or "for mutual aid or protection" (collectively "working conditions") both during work and non-work time, *Purple* is too narrow. Rio, like most other employers, recognizes that employees routinely use email during work time to communicate about working conditions and engage in protected activity.

Rio, like Purple Communications and every other employer who allows employees to use email or other computer resources, expects and acknowledges that employees will communicate about working conditions. They permit such communication because supervisors and management use email to communicate with employees and each other about working conditions. The only conclusion that can be drawn from this record is that the Board's *Purple* decision was too narrowly decided. As long as employees are allowed use of email[1] to communicate among themselves at all, they may use it for the protected concerted activity of communicating communication among themselves or with supervisors or management, or other

[1] For reasons noted below, we focus on email.

employers or any other persons including unions, about working conditions. In summary, all of these communications constitute "business information."

The Board's "Notice and Invitation to File Briefs" ("Notice") was wrongfully issued because it did not review the record in this case. As we will show, there are several compelling reasons why the Board should rescind its Notice and consider, if appropriate, the issues raised in *Purple* in other cases. Primarily where the employer has for business reasons granted more rights than *Purple* created, there is no *Purple* issue. Additionally: (1) Member Emanuel should have been recused; (2) the Computer Usage policy is antiquated and was replaced in 2007; (3) the procedural posture prevents full consideration of the issues suggested in the Notice; and (4) the Board must also decide the issues remanded by the Ninth Circuit.

Fundamentally, the employer's restriction on the use of computer resources, which prohibits employees from "[s]end[ing] chain letters or other forms of non-business information,"[2] allows employees to send information about working conditions, which is essential "business information." Certainly, when management communicates about working conditions, it is "business information," and so too, when employees do the same, it remains "business information." Moreover, part of the rule, which is not quoted by the Board in the Notice, expressly allows employees to use the email for personal purposes, which could be reasonably construed to include email among employees or to outside labor organizations or other persons about working conditions. The Board simply never looked at this case closely, but mistakenly took advantage of it in an attempt to quickly overrule *Purple*. We will take this opportunity to demonstrate that where employers generally grant some employees access to email, they cannot prohibit those employees from communicating about working conditions, even on work time, because it is protected activity.

II. THE FACTS IN THIS RECORD SHOW THAT EMPLOYEES USE THE EMAIL TO COMMUNICATE ABOUT WORKING CONDITIONS.

The employer is Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino. It is a

[2] The most reasonable reading is that it is non-business chain letters that are of concern.

single casino with approximately 3,000 employees. (Tr. I, 27.)[3] Of those, approximately 1,700 are under union contracts. *Id.* There are three separate bargaining units. (Tr. I, 61.) The Charging Party, International Union of Painters District Council No. 15, Local 159 ("Union") does not represent any of the employees.[4]

Caesars Rio All-Suites ("Rio") is part of a large conglomerate of casinos. The parent corporation is Caesars Entertainment. (Tr. I, 27.) This dispute involves only Rio, since the 2007 Handbook applies only to Rio.

The 2007 Handbook was replaced by the 2015 Handbook. The 2015 Handbook substantially modified the 2007 Handbook. Some portions of the 2015 Handbook apply only to Rio but most portions apply to all the Caesars Entertainment properties.

At the time of the second day of hearing in 2015, the platform maintained by the parent corporation and used by Caesars Entertainment[5] to access email was known as the "Remedy" system. It is the "IT System." (Tr. II, 25.) Although not described in the record as a "platform," that is the current term to describe this function.[6]

Email access is obtained through the Remedy system. (Tr. II, 28.)[7] On line (internet) access is also obtained through the same platform.[8] The employer's payroll and timekeeping

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[3] The first day of hearing on January 10, 2012, will be designated "Tr. I." The second day (after remand) on December 15, 2015, will be designated "Tr. II." The computer usage rule at issue was found in the 2007 Handbook, Joint Exhibit 1 to the first day of hearing. *See* pages 2.13-2.16 (we refer to the Handbook's pagination, not the handwritten pagination). It will be referred to as 2007 Handbook. A revised handbook, which we refer to as the 2015 Handbook, was introduced as Respondent Exhibit 1 on the second day of hearing. The "Computer, Electronic Devices, Systems and Data" policy in the 2015 Handbook applies to all of "Caesars Entertainment." (*See* 2015 Handbook, p. 22.) The 2015 Handbook is not the subject of any unfair labor practice complaint in this matter. Subsequent charges were filed against Caesars Entertainment, and that matter was settled in Case No. 28-CA-166871.

[4] There is a pending representation case in which the Hearing Officer sustained objections to an election, which the Union lost. No new election has been scheduled, in part, awaiting the outcome of this case. *See* Case No. 28-RC-6747.

[5] All of the systems were maintained by the parent corporation, Caesars Entertainment, and used by Rio and many other listed employers. (See pp. 1.3-1.6.)

[6] There may well be many other platforms utilized by Caesars Entertainment. Because the only witness was an individual from Human Resources who was intentionally ignorant of other IT systems, there is no record as to the existence or use of any other platforms.

[7] Access can also be obtained through the ISS system. (Tr. I, 28.)

system is known as Timeworks. Managers generally have access to Timeworks. (Tr. II, 28-29.) Timeworks is maintained in the Human Resources system, which is on the Remedy platform. The Human Resources system is known as Harrah's 1. (Tr. II, 28, 30, 74.)[9]

There is an HR deduction system, which apparently is also maintained through the Remedy system. (Tr. II, 29.) Human Resources persons have access to Equifax, a vendor, through an email system. Equifax administered the unemployment claims for the employer. (Tr. II, 31.) There is separate internet access to the Gaming Control Board for purposes of obtaining and maintaining gaming licenses. (Tr. I, 29, 32.) There is restricted access to Timeworks, Equifax, Harrah's 1 and other applications on the Remedy platform. (Tr. II, 29-31)

The employer maintains an intranet, and all employees have intranet access through a portal. (Tr. II, 29, 50.) Computers are maintained throughout the facility, including the dining room, and there are no temporal or other limits to use of the intranet portal ("portal"). There are also televisions in various locations where information is provided to employees. (Tr. II, 52.) Employees can use the portal for obtaining information about themselves and information generally about the company, including policies. The portal has some interactive functions allowing employees to submit information or obtain information. (Tr. II, 48-50.) There is no suggestion that employees cannot access the portal concertedly or to obtain information for use in protected concerted activity. Like other intranets that are available during work time and after work time, there is no evidence that this employer ever limits employee access for protected concerted activity through the portal.

Dean Allen, the Vice-President for Labor Relations, testified in the first hearing that he was "sure they do all the time" in response to a question as to whether emails are used among employees to discuss working conditions. He explained:

> Q. [By Counsel for the General Counsel] I'm simply asking the type of content that an employee is able to send when using company resources, computer resources

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[8] One group has internet access without Outlook (Tr. II, 58)

[9] It also is referred to as "HRIS, Human Resources Information Systems." (Tr. II, 73.)

> A. My interpretation of soliciting for personal gain and advancement of personal views [referring to earlier questions about employees communicating about wages] is not what you tried to suggest.
>
> Q. So I am correct then that an employee couldn't send out an email to his fellow employees, not a third party, discussing his wages, his benefits, his hours, his working conditions.
>
> A. I'm sure they do all the time. (Tr. I, 54-55)

Subsequently, Mr. Allen explained that no employee has ever been disciplined for violation of the rule which would limit the ability of employees to send emails to other employees about working conditions. (Tr. I, 65. *See also* Tr. II, 38.)

Mr. Allen conceded further that emails addressing non-work matters are permitted so long as not otherwise improper:

> Q. Now, employees are permitted to send emails, personal emails, so long as they don't convey or display anything fraudulent, pornographic, profane, offensive, libelous or slanderous. Is that correct?
>
> A. Yeah.

(Tr. I, 51 (confirmed again on same page).)[10]

Aisha Collins, who was HR Manager at Rio, Caesars[11] and Harrah's (Tr. II, 19-20), was offered as the employer's only witness at the second day of hearing. She had no knowledge about how other departments grant access or how email or computer resources are used. She had no knowledge about an IT matter relevant to the issues. The employer chose her as a witness because of her general ignorance except that she claimed she only knew of a few employees who had access.

She explained that, as to her department, employees could have access only if they were sponsored or approved through an established procedure. She was unsure about how many employees had email access. (Tr. II, 39, 37, 54-55.) Ms. Collins conceded that she had no knowledge of how other departments obtained access to email systems for their employees:

[10] It isn't clear whether Mr. Allen was limiting the emails to personal emails or including both personal and business emails.

[11] The facility at issue is the "Rio" not the Caesars [Palace] which is separate casino.

> Q. Okay. All right. And some of those have access because their sponsors put the form in for them to get them access?
>
> A. I could not answer that. I can only talk about HR and how I did.

(Tr. II, 47.)

As to her department, there are eleven employees, and none is a supervisor. (Tr. II, 46.) They all have access to email.[12] Thus, in this department, which is the only department discussed with any detail on the record, the eleven employees all have access to email and email among themselves or with employees or managers.

Ms. Collins testified that there were certain employees who were presumptively given access to email, which included "manager, assistant manager, senior watch … probably a VIP front desk agent [and] … of course, HR." (Tr. II, 39.) However, the employer presented no evidence that the VIP front desk agent or senior watch or assistant managers were supervisors. They have both email and internet access. In summary, in the HR Department, access is controlled by the manager, and all eleven employees have access to email and use it for communicating about working conditions which is encompassed within "business information."

The ALJ was correct that there are employees, both in the Human Relations Department and outside, who have access to email and, in Mr. Allen's words, routinely use it for communicating about working conditions. Mr. Allen's testimony that many employees use email routinely is uncontroverted by Ms. Collins professed lack of knowledge of how other departments control access to email.

There is an intranet system to which employees have unlimited access. The record also demonstrates that there are other applications (Harrah's 1, Equifax, HR Deduction and Gaming Control Board) where access is controlled by management. For example, as to the Gaming Control Board, employees have access when they need to update a gaming license, but that's done exclusively through the HR department.

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[12] Although employed by Caesars Entertainment, they email with employees of various properties, including Rio and other separate employers.

There is no evidence in the record of any special circumstances as described in *Purple* that would limit employee access to email or the portal to the extent they have such access. The employer offered none at the hearing. (Tr. II, 68.) "Respondent's counsel adduced no evidence that any aspect of the rule is necessary to maintain production and discipline within its work force other than Collins' testimony that Respondent's VIP agents are granted access to its email system." (ALJ Decision, p. 8 ("ALJD").) No evidence was adduced by having a witness from the IT department testify about Remedy or any other platform. The Board should draw an adverse inference, based on the failure to call a witness to the contrary, that employees regular use the email and use it for about working conditions.

III. THE COMPUTER RULE AT ISSUE

The Board's Notice refers only to the "[maintenance of] a policy prohibiting the use of its computer resources to send non-business information." The Notice suggests the Board was limiting its consideration to that phrase, "non-business information."[13]

It is undisputed that some employees have access to computers. (Tr. I, 49, 51, 54, II, 22-23.) Those computers have access to email and the intranet or portal.

The Board in the 2015 Decision quoted the applicable rules:

The computer confidentiality rule, p. 2.14 states in relevant part (emphasis added):

> *Do not disclose or distribute outside of [Rio's] any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department.* In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.

The general restrictions section on computer usage, p. 2.14, provides (emphasis added):

[13] The 2007 Handbook entitled this section as "Computer Usage" because it is contained in a larger set of rules. The particular rule is part of the four pages of policy, pages 2.13-2.16. Although we generally refer to the Computer Usage policy, what is at issue is the "General Restrictions" contained on page 2.14 and the "Confidentiality" paragraph on the same page.

Computer resources may not be used to:

- Commit, aid or abet in the commission of a crime
- Violate local, state or federal laws
- Violate copyright and trade secret laws
- *Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom*
- *Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous*
- *Send chain letters or other forms of non-business information*
- Seek employment opportunities outside of the Company
- Invade the privacy of or harass other people
- *Solicit for personal gain or advancement of personal views*
- *Violate rules or policies of the Company*

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.

Caesars Entm't, 362 NLRB No. 190, slip op. at 5 n.13 (2015) ("*Caesars 2015*").

IV. THE NOTICE AND INVITATION TO FILE BRIEFS SHOULD BE RESCINDED

A. MEMBER EMANUEL IMPROPERLY PARTICIPATED IN THIS CASE

The Charging Party has filed a motion with the Board to rescind the Notice on the ground that Member Emanuel improperly participated in this case. *Purple* remains a live case awaiting the ruling in this case,[14] and Member Emanuel's former firm continues to represent Purple Communications, creating an irrefutable violation of his ethical duty to recuse himself totally from the consideration in this case or any case where *Purple* is challenged.

[14] *See* Order of Ninth Circuit dated September 24, 2018, DktEntry 79, Case No. 17-70948, *et al.*

B. THE COMPUTER USAGE RULE THAT IS AT ISSUE WAS RESCINDED IN 2007 AND IS NOW MORE THAN 11 YEARS OLD

The Computer Usage rule was contained in a handbook dated September 1, 2007. (Tr. I, 30, *see* footer). The handbook is now more than eleven years old and was created during a period when electronic communications and computer systems were different and far less prevalent. The new handbook is dated May 2015 and contains very substantial changes.

For example, and most relevant to this case, the computer usage policy is substantially different. *Cf.* 2015 Handbook, pp. 22-26. The language at issue in the old handbook, which does not allow computer resources to "be used to … [s]end chain letters or other forms of non-business information" has been modified to prohibit use of computer resources for "[s]ending chain letters, pyramid schemes of any type, or other forms of non-business information across networks or communication systems." As rewritten, it limits non-business information to pyramid schemes or chain letters or similar broadcasts. This limitation is a substantial narrowing of this rule. It allows communications about business issues, including working conditions, even if sent in a chain letter.

Another relevant example, is that the 2007 rule prohibits use of computer resources "to … [s]olicit[] for personal gain or advancement of personal views." The new rule only prohibits employees from using computer resources for "[s]oliciting for personal gain or advancement of personal views during working time or the working of the person who is being solicited." The new rule thus allows employees to solicit for advancement of personal views during their non-work time. Moreover, Dean Allen explained that this rule does not apply to communications about working conditions. (Tr. I, 54.) Thus, the new rule expressly allows the kind of communication that *Purple* made possible to those who have email access. Rio has no business justification to impose the limitation the Board Notice seeks to address because Rio voluntarily adopted a rule that allows such communication. Plainly, this is an unsuitable case in which to test a rule; Rio, and Caesar's more generally, voluntarily adopted rules allowing broader access and use of email than required by *Purple*.

The 2007 handbook refers to an outdated and discarded platform titled "Insite." (2007 Handbook, pp. 2.13 and 2.16 [defining "Insite" as "Harrah's portal for accessing company-specific resources"].) There is no reference to the Remedy platform, which was implemented after the 2007 revision and was in place during the 2015 hearing. (Tr. II, 42.)[15] Thus, the Board is reviewing a handbook describing a platform that was abandoned in 2007.

Although the case is not moot because Rio could post a Notice, any Notice must refer to the fact that the policy has been rescinded and a new rule is in place. As we shall note, the new 2015 rule confirms that employees may use email and computer resources during work time and non-work time for communication about working conditions.

C. THE PROCEDURAL POSTURE OF THIS CASE IS LIMITED BY THE BOARD'S NOTICE, THE REMAND TO THE ADMINISTRATIVE LAW JUDGE AND THE ADMINISTRATIVE LAW JUDGE'S READING OF THE REMAND

When the Board issued its *Caesars 2015* Decision and remanded the Computer Usage policy (including the confidentiality clause) to the Administrative Law Judge ("ALJ") for a hearing, the Board expressly limited consideration to selected portions of the Computer Usage[16] policy, which extends four full pages. (2007 Handbook, pp. 2.13-2.16.) The Board limited the consideration to the language quoted above. *See* 362 NLRB No. 190, slip op. at 5 & n.14. The Notice of Hearing issued on September 28, 2015, limited the remand hearing to only those issues required to be heard by the Board's remand. The ALJ who heard the case limited her consideration to that portion of the rules. (Tr. II, 5, 9-10, 67-69). The ALJ interpreted the remand narrowly to allow the parties to litigate "access." (Tr. II, p. 68.) The Board's remand refers to "employer rules restricting employee use of a company's email system." 362 NLRB

[15] The 2015 Handbook has no reference to "Insite."

[16] The Board inaccurately identifies the rules as "Use of Company Systems, Equipment, and Resources." 362 NLRB No. 190, slip op. at 5. There is no such rule. It is called "Computer Usage." (2007 Handbook, p. 2.13.) The Board incorrectly stated that the "judge found that the Respondent's work rules entitled 'Use of Company Systems, Equipment, and Resources' are lawful …." 362 NLRB No. 190, slip op. at 5. This was the title of the parallel, significantly revised, rule in the 2015 Handbook.

No. 190, slip. op. at 5. The Notice expressly limits consideration to the single phrase "non-business information."

Given then the narrow and explicit nature of the remand, this Board cannot use this record to go beyond email and the question of whether "business information" includes working conditions.

D. THE EMPLOYER'S COMPUTER USAGE POLICY IS INVALID FOR REASONS ALREADY FOUND BY THE BOARD, AND A FINDING IN THIS CASE WOULD NOT CHANGE THE REMEDY

The general restrictions prohibit employees from using computer resources "to … [v]iolate rules or policies of the Company." The Board has already found that several other policies violated the Act. *See Caesars 2015*, 362 NLRB No. 190, slip op. at 6. Since the Computer Usage policy prohibits use of computer resources that "Violate rules or policies of the Company," the Board cannot evaluate the Computer Usage policy in a vacuum without evaluating the other rules or policies.[17] On this ground alone, the Computer Usage policy is invalid.

There is no justification for the Board to consider this Computer Usage policy separately when it already has found that other company policies are invalid and those policies are incorporated into the Computer Usage policy.[18]

E. THE BOARD ERRONEOUSLY FOUND THE NO CAMERA RULE INVALID IN THE *BOEING* CASE, AND THE NINTH CIRCUIT REMAND OF THE 2015 DECISION REQUIRES FURTHER ACTION BY THE BOARD

The Charging Party has already objected to the Board's finding in *Boeing* regarding the no camera rule. *See* 366 NLRB No. 128 (Motion for Reconsideration and Intervention denied).

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[17] The Ninth Circuit vacated the Board's Decision in *NLRB v. Caesar's Entertainment*, No. 17-71353 and remanded to the Board for reconsideration in light of *Boeing,* DktEntry 48, except as to one finding which the Court summarily enforced. The Charging Party has asked to brief those issues in light of *Boeing*.

[18] In a related case, the employer settled charges after issuance of complaint at twenty-two separate properties (each under the Caesars Entertainment umbrella) over the 2015 rules and agreed to rescind those rules. *See* Case No. 28-CA-166871. The settlement concerned portions of the "Computer, Electronic Devices, Systems and Data" rules.

The no camera rule interferes with employee use of computer resources because employees cannot take pictures in non-public areas of unsafe conditions or protected concerted activity and then transmit such pictures by email to other employees or managers. The validity of that rule will affect the outcome of the validity of the Compute Usage rule.

F. THIS IS THE WRONG CASE FOR THE BOARD TO BROADLY RECONSIDER COMPUTER USAGE POLICIES AND TO OVERRULE *PURPLE*

As detailed above, this case is not an apt case for the Board to broadly reconsider computer usage policies and determine whether, or to what extent, to overrule *Purple*. The correct course is for the Board to rescind the Notice, recuse Member Emanuel and look for another case if it so chooses without these procedural barriers.

This case does not present an issue of any restriction on the use of the computer resources during non-work times.[19] Employees have access during both work and non-work times. The reference to allowing some personal use confirms this. As a result, there is no restriction in the rules that would trigger the application of *Purple* which applies specifically only during non-work times. Rio has apparent business reasons for granting broader access to email and computer resources than *Purple* requires. It is may be the union environment where union buttons are worn "all over the building." (Tr. I, 39). But whatever the reason, the Board cannot use this case to overrule or limit *Purple* where the employer's own rules are less restrictive than what *Purple* would require.

Charging Party recognizes that another employer might impose very restrictive rules regarding the use of computer resources. For example, Rio severely restricts the number of employees who have access to the database about customers. However, once access to email is granted, there are no limits on its use other than common sense.[20] Additionally, those employees are allowed to access and use personal email. (Tr. I, 50.)

[19] There are no restrictions on the right of employees to be on the property before and after work other than a requirement for employees to use employee entrances. (2007 Handbook, p. 2.19.)

[20] Because management is allowed use of email, it is difficult for Rio or any other employer to impose different rules about personal use or other use on selected classifications of employees such as exempt vs. non-exempt.

V. THE BOARD SHOULD RETURN TO THE PRECEDENT ESTABLISHED UNDER *LUTHERAN HERITAGE VILLAGE-LIVONIA*

The Board should return to the precedent established under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the Board's standard in *Lutheran Heritage*, many employees could reasonably construe the 2007 Computer Usage rules as prohibiting discussion about working conditions among themselves, their union or employees of other employers, including other Caesars Entertainment locations. This is heightened by the warning in the 2007 Handbook that employees "are responsible for contacting your department manager of the Law Department for instructions" with respect to any confidential information." (*See* 2007 Handbook, p. 2.14.) Cf. *Valley Health Systems LLC d/b/a Spring Valley Hospital Medical Center*, 363 NLRB No. 178 (2016).

The Charging Party concedes that applying the new *Boeing* standard, the Board will likely find the phrase "non-business information" to be lawful. *Boeing* imposes a new regime, looking not only as to how employees "would interpret" the language but as to how employers "would interpret" the language. Here, the employer, in particular its Vice-President of Labor Relations, interprets the language to allow employees to communicate among themselves about working conditions. From this Board's perspective, the fact that the employer would interpret it in that open way is imposed upon employees who, given their perspective, may interpret it differently. Nonetheless, for purposes of this brief, we acknowledge that the Board would likely find the language to be lawful under the *Boeing* standard.[21]

What is completely missing from this record is any business justification for the language. As noted, the employer offered no business justification, except to argue that its policies limit access to email to a select group of employees. Even assuming that to be correct, there was no business justification for the limitation on those who are granted access. Cf. *Boeing*, Slip Op. at p 15 (employers may offer evidence in support of any business justification.)

[21] This is a Category II rule that requires individual scrutiny and evidence to support any business justification.

The General Counsel's brief filed in response to the Notice suggests that there were two business justifications. The first, concerning whether the Board imposes an obligation upon employers to allow employees to use their communication systems, doesn't apply here since Rio has voluntarily allowed such access and has created no temporal restrictions. The second is the claim that this is an "undue and unnecessary burden on employers' business operations and has the practical effect of reducing productivity, disrupting business operations, and can compromise system security and confidentiality." (*See* G.C. Brief, p. 3.) The blunder with General Counsel's contention is that Rio made no effort to put on any evidence to support either of those reasons or any other reason.[22] Indeed, here, business decision to grant access at all times throughout Caesars Entertainment proves false the argument.[23]

In summary, because the employer would and does interpret the rule to allow communications about working conditions, the Board has before it a record that rejects the arguments made by the dissents in *Purple* and the General Counsel in this case.

VI. COMMUNICATIONS IN ELECTRONIC FORMAT OR BY VOICE OR IN WRITING THAT CONCERN WAGES, HOURS, AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT ARE CORE PROTECTED CONCERTED ACTIVITY AND SERVE A BUSINESS PURPOSE

A. EMPLOYERS AND EMPLOYEES COMMUNICATE ABOUT WORKING CONDITIONS THROUGH VARIOUS MEDIA, INCLUDING EMAIL, AND THE COMMUNICATION INVOLVES BUSINESS INFORMATION

When employees talk around the water cooler, on the shop floor, in the break room, in the parking lot, by phone, email, social media, picket signs or any other means about working, they necessarily are discussing and communicating "business information" and certainly a core element of business information.[24]

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[22] There are many restrictions in the Computer Usage rule that adequate protect employer interests. (See Tr. I, 51, rules against pornography, defamation, etc. apply).

[23] The 2015 Handbook continues to allow access, thus refuting each of those arguments. The 2007 Handbook limits personal email only out of concern over the size of some attachments. Thus, impliedly, so long as the attachments don't overwhelm the system, Rio has no concern about the use of personal email through the employer's platform.

[24] This information is stored in the Harrah's 1 system in the Remedy platform confirming this.

Indeed, the record reflects the fact that email is used by some employees repeatedly about matters affecting employees. The employer's witness described employees in human relations who repeatedly used email to communicate with managers and among themselves about those issues.[25] The fact that these employees use email certainly reflects the common experience that all employees communicate about all such issues. Similarly, management communicates with employees about issues, including wages, scheduling, discipline, and many other matters that relate to working conditions. Employers can't function if employees and managers do not communicate about working conditions.

Thus, the employer's limitation on use of the computer systems to transmit "business information" would, allow them to communicate about issues involving the workplace. Although some employees might find the language limiting, we do not expect this Board would find that language to be unlawful under *Boeing*, even though it would be unlawful under *Lutheran Heritage*. But even under *Boeing*, the language is expansive enough to make it unlawful for the employer to discipline anyone or prohibit them from communicating about working conditions.

Board cases are replete with examples of employees communicating about such conditions during work time and in the workplace. In fact, there are many cases where employees have used employer email and computer systems to communicate about these issues and the Board has found their activity to be protected concerted activity. *See Timekeeping Sys., Inc*., 323 NLRB 244 (1997); *Cal. Inst. of Tech. Jet Propulsion Lab.*, 360 NLRB No. 63 (2014); *Food Servs. of Am.*, 360 NLRB No. 63 (2014); *Hitachi Capital Am. Corp*, 361 NLRB No. 19 (2014); *Grand Canyon Educ., Inc*., 362 NLRB No. 13 (2015), *reaffirming*, 359 NLRB No. 164 (2013). Once the employer allows employees access to the computer resources, it necessarily allows, if not encourages, them to use those computer resources for communication about

[25] The employer did not establish that these are confidential employees.

working conditions.[26] The Board's rule requiring intranet posting as a standard remedy reflects exactly this idea.

Moreover, employers are in continuous communication about working conditions either to employees or among other persons who may not be statutory employees, such as supervisors and managers. Such discussions concern business information. The fact that employees, rather than employers, communicate about working conditions does not alter it into "non-business information."

Here, the record establishes that there are a group of employees, working in human relations, who use the email system for exactly that purpose, who communicate with managers and others about employees' work related issues.[27] The fact that these employees use email for communicating about working conditions reflects the fact that employers allow and encourage most employees to use email to communicate about working condition issues.[28]

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[26] There are many cases in other employment contexts where employees and employers use email: *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016) (in FMLA and ADA case, employee emailed her supervisor regarding her request for leave and asking what paperwork was needed); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) (employee emailed employer documents from his work computer to himself and his wife); *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009) (executive sent a mass email to employees regarding the termination of an employee); *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008) (district managers would send daily emails with instructions to store managers); *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005) (employer sent a company-wide email announcing a new dispute resolution policy); *Dixon v. NBCUniversal Media, LLC*, 947 F.Supp.2d 390 (S.D.N.Y. 2013) (email sent to all employees regarding the alternative dispute resolution procedure used by NBCU); *Smyth v. Pillsbury Co.*, 914 F.Supp. 97 (E.D. Pa. 1996) (employee used employer's email system to send inappropriate messages to his supervisor); *Wills v. Superior Court*, 195 Cal.App.4th 143 (2011) (employee sent threatening email to other employees at email addresses the employer provided); *Denver Publ'g Co v. Bd. of County Comm'rs of Arapahoe County*, 121 P.3d 190 (Colo. 2005) (employees sent romantic or sexually explicit messages using the county's systems); *Coleman v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 905 N.E.2d 1015 (Ind. Ct.App. 2009) (employees had conversations in mass email chains) *Hernandez v. Kaisman*, 103 A.D.3d 106 (N.Y. App. Div. 2012) (defendant sent offensive emails to all employees in his medical office).

[27] The employer did not establish nor contend that these are confidential employees. Even assuming they are confidential, the Board has not found they are not entitled to the protections of the Act. *See* Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy*, Section 3.7 (JURIS 2013).

[28] Rio, like most employers, encourages communication about work related issues. (*See* 2015 Handbook, p. 1.2.)

Although, again, Charging Party contends that under *Lutheran Heritage*, and prior cases, some employees would find the "non-business information" provision limiting and unlawful, we don't expect this Board to concur, so we argue that "business information" necessarily includes any information about working conditions even if unfavorable. When the Board's composition changes, that rule will again change.

This is the crux of this case. Once an employer opens up the computer usage to communication about working conditions, employers cannot prohibit such communication when it is critical, adverse or questioning, sarcastic or even disrespectful. Indeed, we submit the Board must recognize that some employers expect employees will raise criticisms to them, either directly or indirectly, through various forms of communication. Employers invite criticism and suggestions for change. They often seek input, even if adverse, so that they can correct problems.

As noted above, the Board has made it clear that once employees communicate, they cannot be disciplined for communicating in ways that are critical of the employer. Critical communication is protected concerted activity, so long as the communication does not go so far out of bounds that it loses protection.[29]

The 2007 Handbook does not, moreover, prohibit communications with outside organizations. *Cf., Register Guard*, 351 NLRB 1110 (2007), *enforced in part and remanded sub. nom., Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). Nothing in these rules limit communication about business information to outside entities (including, of course, unions) unless the information is also subject to the confidentiality rule. Thus, all the business information that is available to employees can be transmitted by employees to outside organizations, as long as the information concerns wages, hours and working conditions, which

[29] This argument is buttressed by other language in the Computer Usage policy. The computer usage policy states "internet mail and website browsing are allowed for business purposes." (*See* 2007 Handbook, p. 2.13. *See also id.* ("Use your company email address for business purposes.").) Since business purposes include questions and issues about working conditions, this expressly allows employees to communicate about those subjects. However, although the Board has not addressed this language in its Notice, it is relevant to the issue as to whether the phrase "business information" encompasses working conditions.

suffices to meet the employer's test of "business purposes." For example, when an employee communicates with a union about low wages or the need to get rid of an abusive boss, that communication is business information for a lawful business purpose. Rio's rules plainly allow such communications.

There is reason for this. More than half of the employees at Rio have the advantage of union representation and have the right to contact their union.

The 2007 Handbook states: "With department manager approval, you may use computer resources for projects related to work with civic organizations and other volunteer or charitable organizations." (*See* 2007 Handbook, p. 2.15.) It would be discriminatory to deny such computer use for work with a union, which is a quintessential civic or other volunteer organization.[30] In this strong union environment, in a "right to work for less" state, Rio allows communications between employees and between employees and Unions. (*See* Tr. I, 54-55.)

B. THE EMPLOYER MADE NO EFFORT TO ESTABLISH ANY BUSINESS JUSTIFICATIONS FOR ANY LIMITATION IN THE USE OF COMPUTER RESOURCES IN THE REMAND HEARING

As noted by the ALJ, Rio offered no evidence to support any special circumstances to limit the use of computer resources. In fact, "Respondent's counsel adduced no evidence that any aspect of the rule is necessary to maintain production or discipline within its workforce other than Collins' testimony that Respondent's VIP agents are granted access to its email system." (*See* ALJD, p. 8.) The employer presented no evidence about the need to limit the use of computer resources, such as the arguments advanced without evidence already by the General Counsel and that will be advanced by amici.[31] The employer didn't even advance the argument that it monitors emails or other use.[32] It offered no evidence that it is concerned about hacking

[30] The 2015 Handbook expressly permits email and other contacts with outside organizations. (*See* 2015 Handbook, p. 24.)

[31] In the first hearing, Rio' witness, Mr. Allen, testified there was broad use and access.

[32] The new handbook does contain such a statement. Thus, there is no record in this case to support the finding of any business justification to limit the use of computer resources and any such justification has been mooted by the employer's later policy.

or burdening the system. It offered no evidence that it is concerned about any issue.[33] The employer's only witness claimed ignorance as to how many, if any, bargaining unit employees had email access. (Tr. II, 54-55.) The employer has an entire IT department, which could have testified. It chose to limit its record to the issue of limited access and eschewed putting on any evidence to support any business justification to limit that usage.

The employer could not contradict the prior testimony of Dean Allen, Vice-President for Labor Relations, who had conceded that employees use the email all the time for communications about working conditions. (Tr. I, 54-55.) The employer may well have done this since more than half of the employees have the advantage of representation by one of three unions, and the employer does not have any justification to limit the use of computer resources.[34]

The employer's only argument was that it controlled those who have access to email. The ALJ held that "Respondent routinely grants an unspecified number of its employees access to its email system." (ALJD, p. 7.)[35] That finding is consistent with the testimony of Mr. Allen. It is also not contradicted by the testimony of Ms. Collins, who identified various employees who had access to email.[36]

The discussion above about the change in the solicitation rule in the 2015 Handbook illustrates why the employer offered no such evidence. Since it allows solicitation during non-work time under the new handbook, already in effect at the time of hearing after remand, it could not offer any business justification for any limitation in the old handbook.[37] Other substantive changes in 2015 Handbook demonstrate the same effect.

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[33] The Board should draw an adverse inference that no such evidence exists. There is an IT Department referred to repeatedly in the Computer Usage policy and the 2015 Handbook. *Cf. Boeing*, where Boeing presented extensive testimony justifying its no camera rule.

[34] Both handbooks note that the terms of any collective bargaining agreement will prevail over the Handbook.

[35] This was confirmed by Dean Allen's testimony in the first hearing. (Tr. I, 49: 22-25.)

[36] It is also consistent with the 2007 Handbook, which applies its rules on email use to all employees. (*E.g.*, 2007 Handbook p. 2.35 (harassing emails).)

[37] The no distribution rule applies to "literature" and "in working areas." (2007 Handbook, p. 2.19.) There is no reference to "literature" in the entire Computer Usage policy, and it cannot be construed to apply to paper documents.

Additionally, the ALJ noted that the employer argued that in the gaming industry there are reasons to keep guests' information confidential.[38] The concerns over disclosure of guest information were found to be "speculative" and contradicted by the fact that access was granted to email. (ALJD, p. 8.) Even assuming there is a reason to keep guest information confidential, that does not apply to information about working conditions.

There is no evidence in the record to establish any business justification, and the employer's argument that only a limited number of employees are granted access to email doesn't defeat the point that each of those employees who are granted access are entitled to Section 7 rights.[39]

C. EMPLOYEE USE OF EMAIL IS PERMITTED AND ENCOURAGED BY RIO FOR THOSE WHO HAVE BEEN GRANTED ACCESS

The Board cannot avoid the facts established on this record, in which the employer allows, or at least does not prohibit, communicating business information to other persons, including a union or employees of other employers.[40] Nonetheless, that's the case this Board is presented with.

VII. OTHER PROHIBITIONS AND THE COMPUTER RESOURCE RULE ARE UNLAWFUL AND ARE SUBJECT TO THE REMAND FROM THE 2015 DECISION

The Ninth Circuit has remanded, at the Board's Request, its 2015 Decision. See footnote 18, supra. Those rules are pending, and some impact the Computer Usage policy.

We again clearly state that the employer's rule on which the Notice focuses, which restricts the use of email to "[s]end chain letters or other forms of non-business information," allows the unrestricted right to send "business information" for those who are granted access to

[38] It did argue the information about customers is confidential. We agree, and nothing in this case suggests that employers cannot protect the confidentiality of information about gamblers.

[39] The Union does not dispute that an employer can limit the access of employees to company provided email. On this record, this Board cannot reach the question of whether employers would have the obligation to provide access in some circumstances.

[40] Here, where there are many Caesars Entertainment properties, which are separate employers, employees have a heightened right to communicate with other Caesars Entertainment employees on other sites who are employees of other employers.

email and is not unlawful under *Boeing*. The Complaint allegation as to that part of the Computer Usage policy should be dismissed.

A. THE PROHIBITION AGAINST VIOLATING STATE LAWS IS OVERBROAD

The second bullet point of the Computer Usage policy prohibits employees from using computer resources to "Violate local, state or federal laws."

The Nevada "right to shirk" law states:

> Any combination or conspiracy by two or more persons to cause the discharge of any person or to cause him to be denied employment because he is not a member of a labor organization, by inducing or attempting to induce any other person to refuse to work with such person, shall be illegal.

N.R.S. § 613.280. Conspiracy.

This prohibits two workers from using computer resources to induce other employees to refuse to work with another employee who refuses to support or join the union. This violates the First Amendment because it both prohibits speech and forces employees to associate with others with whom they disagree. Such speech and freedom of non-association is completely protected. It also violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, to the extent employees refuse to work with non-members who refuse to help other employees as a religious principle.

B. THE PROHIBITION AGAINST SHARING CONFIDENTIAL INFORMATION IS OVERBROAD

There are two confidentiality rules at issue.

The rule contained with the Computer Usage policy is overbroad and states:

> Do not disclose or distribute outside of Harrah's any information that is marked or considered confidential or propriety unless you have received a signed non-disclosure agreement through the Law Department. (*See* 2007 Handbook, p 2.14.)[41]

[41] The ALJ substituted the word "Rio's" for Harrah's, assuming that it was limited to the one property. That significantly changes the meaning, since the reference to Harrah's referenced all the properties currently under the Caesars Entertainment umbrella. This is a name change from Harrah's to Caesars Entertainment. (Tr. II, 58-59.) This preserves the right of employees to communicate with fellow union members at other Caesars Entertainment properties.

Because the second broader rule which defines "information that is considered confidential" is overbroad, the Computer Usage rule is overbroad as the Computer Usage policy incorporates within it all other employer rules and policies.

As to the second much broader rule found invalid in its 2015 Decision, the Board found the Confidentiality rule appearing at page 2.21 to be "extraordinarily broad in scope, prohibiting employees from sharing 'any information about the Company, which has not been shared with the general public." (*Caesars 2015*, 362 NLRB No. 190, slip op. at 2.) Because the Confidentiality rule embedded in the Computer Usage policy applies "to any information that is ... considered confidential," the rule incorporates the definitions from the unlawful confidentiality rule.[42] It is unlawful so long as the Board reaffirms its prior finding that the other Confidentiality rule is invalid.

The Confidentiality rule in the Computer Usage rule also prohibits the use of computer resources to:

> Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chat room.

It is unlawful for the same reason; it incorporates the "extraordinarily broad" definition of confidentiality from the rule found invalid and now again pending before the Board.[43]

The phrase "including discussing the company" is far too broad. Employees have a right to discuss the company in the context of communications about working conditions with the public, including the news media, employees of other employers, government officials and every other person.

The "general public" encompasses employees of other employers or union organizers. Additionally, by prohibiting employees from posting such confidential information on a message

[42] Dean Allen's testimony confirms the illegality of this restriction because once employees learn about working conditions from the employer, it is no longer confidential. (Tr. I, 54:6-11.)

[43] Ms. Collins claimed that wages are confidential which confirms the confidentiality rule would be interpreted over broadly. (Tr. II, 65)

board or other public site, the employer effectively prohibits communicating this information to other employees of this employer.

In summary, because the separate confidential provision at page 2.21 is unlawful and the confidentiality provisions in the Computer Usage policy are invalid, the Computer Usage policy is unlawful.[44]

C. THE PROHIBITION AGAINST CONVEYING ANYTHING 'OFFENSIVE" IS OVERBROAD

The bullet point prohibiting displaying anything "offensive" prohibits employees from conveying anything about, for example, joining the Union or organizing or other issues, which are likely to be offensive to management and potentially other employees of the employer or employees of other employers who mistakenly oppose concerted activity.

D. THE PROHIBITION AGAINST SENDING CHAIN LETTERS OR OTHER FORMS OF NON-BUSINESS INFORMATION APPLIES ONLY TO CHAIN LETTERS OR SIMILAR COMMUNICATIONS

We have explained above why "non-business information" does not prohibit information about working conditions. Additionally, the same bullet point that contains the words "non-business information," contains the reference to "chain letters." This was clarified in the 2015 Handbook, which prohibits use of computer resources for "[s]ending chain letters, pyramid schemes of any type, or other forms of non-business information across networks or communications systems." (*See* 2015 Handbook, p. 25.) This illustrates again why the 2015 revisions undermine any effort to justify the 2007 Handbook.

E. THE CATCH-ALL LAST BULLET POINT IS OVERBROAD

The final bullet point, which prohibits use of computers to "violate rules or policies of the company," is overbroad because the Board has already found that various other rules violate the Act. On remand, the Board must decide which rules are invalid and whether they apply to the Computer Usage policy.

[44] The Board's Order can refer to the illegal provisions without requiring rescission of the portion of the Computer Usage rule referring to "non-business information" which is lawful.

F. THE PROHIBITION AGAINST VISITING CHAT ROOMS, MESSAGE BOARDS AND JOURNALS IS UNLAWFUL

Finally, the last paragraph is overbroad. This prohibits employees from visiting "chat rooms, message boards and journals." These "chat rooms, message boards and journals" could be resources to engage in protected concerted activity and discuss working conditions of the Employer. This would include social media sites. *Cf. Design Tech. Grp.*, 359 NLRB 777 (2013). This again proves the antiquity of this handbook, which does not deal with social media sites but only outmoded versions of such media.[45]

Moreover, the rule is unclear. It prohibits visiting an "inappropriate website." But it modifies by the words "non-business" in parentheses. This strongly suggests that what Rio is concerned about is "inappropriate" websites, such as online auctions, day trading etc. It is not concerned about such websites if they are business related.

This would not prohibit an employee from visiting a website, including a chat room, Facebook or similar social media site maintain by a union, workers center, the NLRB, the Chamber of Commerce, the "right to shirk committee," and a host of websites concerning working conditions.

G. BECAUSE RIO PERMITS USE OF PERSONAL EMAIL, ANY ARGUMENT PROHIBITING USE OF THE COMPUTER RESOURCES TO COMMUNICATING WITH A UNION OR OTHER PERSONS IS UNDERMINED

The General Restrictions of the 2007 Handbook "[l]imit the use of personal email including using streaming media (e.g. video and audio clips) and downloading photos." The wording surely implies that some limited personal use is permitted.[46] This undermines any argument against communicating with outside persons, including unions or employees of other employers using email through company-provided computers. Like virtually every employer who allows some employees access to email, they expect employees will use it for some personal

[45] The 2015 Handbook acknowledges the right of employees to use "CEC information systems or networks for … [s]igning up for work related social media accounts and visits to social media sites for work-related reasons." (*See* 2015 Handbook, p. 24.) A work related reason could be to contact a union about health and welfare benefits, a grievance or researching an issue.

[46] This is clarified and expanded in the 2015 Handbook, page 23.

purposes.[47] Although we posit that communicating about work involves "business information," alternatively it is personal and permitted by Rio.

VIII. CONCLUSION

For the reasons argued above, the Board should rescind the Notice. There is no issue in this case that permits reconsideration or overruling of *Purple* because Rio voluntarily as a considered business decision allows broader access and use than *Purple* requires.

Alternatively, the Board should find that because Rio has voluntarily allowed employees to communicate about working conditions, applying the *Boeing* standard, that portion of the rule prohibiting communications that are "non-business information" does not violate the Act because it permits communications about working conditions. Other provisions of the 2007 Handbook violate the Act, and the Board should rule accordingly and issue the appropriate remedy.

Dated: October 5, 2018

Respectfully Submitted,

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[47] For this reason, the language in the 2007 Handbook that prohibits computer resources to be used to "[s]olicit for person gain or advancement of personal views" does not relate to "business information" concerning working conditions.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On October 5, 2018, I served the following documents in the manner described below:

BRIEF OF CHARGING PARTY TO NOTICE AND REQUEST TO FILE BRIEFS

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 5, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler